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No. __-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CEDC FEDERAL CREDIT UNION,

Petitioner,

—v.—

NATIONAL CREDIT UNION ADMINISTRATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 206 of the Federal Credit Union Act ("FCUA") provides the National Credit Union Administration ("NCUA"), with a number of coercive administrative actions to redress perceived problems at federally-insured credit unions. They include: (i) termination of insurance; (ii) cease and desist order; and (iii) conservatorship. Two of the three remedies afford a credit union a factually-specific prior notice, a pre-deprivation evidentiary hearing (with the burden of proof on the NCUA, the right of confrontation, *etc.*) and judicial review which includes at least some evidentiary analysis. The conservatorship procedure omits all of those protections. The NCUA may appoint itself as conservator *ex parte*, without notice, and without affording the affected credit union any opportunity to be heard, either before or after the appointment; judicial review consists of an "arbitrary and capricious" analysis of the one-sided Administrative Record, without considering additional evidence or hearing oral argument.

The CEDC Federal Credit Union, a low-income credit union, was placed in conservatorship by the NCUA, without any allegation of insolvency, loss, theft or fraud, and without notice or a hearing. The District Court considered only the Administrative Record, without allowing additional evidence or oral argument. It held that the conservatorship decision was not arbitrary and capricious, and rejected petitioner's constitutional challenge. The questions presented are:

A. Whether Congress's delegation of authority to the NCUA to appoint itself as conservator is constitutionally infirm?

B. Whether the conservatorship section (§ 206(h)) of the FCUA violates the Due Process Clause of the Fifth Amendment to the United States Constitution on its face and as applied?

RULE 29 STATEMENT RE: PARTIES

The petitioner, CEDC Federal Credit Union, is a federally-chartered non-profit corporation; it has no parent or subsidiary corporations. The caption of this Petition contains the names of all the parties to this action in the Second Circuit.

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CEDC Federal Credit Union (the "Credit Union") respectfully petitions for a writ of certiorari to review the summary order of the United States Court of Appeals for the Second Circuit, entered on September 26, 1996.

OPINIONS BELOW

The Second Circuit summary order (App., *infra*, 1a-6a) is unreported. The United States District Court for the Eastern District of New York memorandum and order (App., *infra*, 7a-13a) is unreported.

JURISDICTION

The Second Circuit summary order was entered on September 26, 1996. The Second Circuit summary order affirmed the district court's decision. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 206(b) of the Federal Credit Union Act, 12 U.S.C. §1786(b), provides:

> **Unsound condition of credit union; notice to correct condition; hearing; judicial review**
>
> **(1)** Whenever, in the opinion of the Board, any insured credit union is engaging or has engaged in unsafe or unsound practices in conducting the business of such credit union, or is in an unsafe or unsound condition to continue operations as an insured credit union; or is violating or has violated an applicable law, rule, regulation, order, or any condition imposed in writing by the Board in connection with the granting of any

application or other request by the credit union, or is violating or has violated any written agreement entered into with the Board, the Board shall serve upon the credit union a statement with respect to such practices or conditions or violations for the purpose of securing the correction thereof. In the case of an insured State-chartered credit union, the Board shall send a copy of such statement to the commission, board, or authority, if any, having supervision of such credit union. Unless such correction shall be made within one hundred and twenty days after service of such statement, or within such shorter period of not less than twenty days after such service as the Board shall require in any case where it determines that the insurance risk with respect to such credit union could be unduly jeopardized by further delay in the correction of such practices or conditions or violations, or as the commission, board or authority having supervision of such credit union, if any, shall require in the case of an insured State-chartered credit union, the Board, if it shall determine to proceed further, shall give to the credit union not less than thirty days written notice of its intention to terminate the status of the credit union as an insured credit union. Such notice shall contain a statement of the facts constituting the alleged unsafe and unsound practices or conditions or violations and shall fix a time and place for a hearing thereon. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the Board at the request of the credit union. Unless the credit union shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured credit union. In the event of such consent, or if upon the record made at any such hearing the Board shall find that any unsafe or unsound practice or condition or violation specified in the

notice has been established and has not been corrected within the time above-prescribed on which to make such correction, the Board may issue and serve upon the credit union an order terminating its status as an insured credit union on a date subsequent to the date of such finding and subsequent to the expiration of the time specified in the notice.

(2) Any credit union whose insured status has been terminated by order of the Board under this subsection shall have the right of judicial review of such order only to the same extent as provided for the review of orders under subsection (j) of this section.

Section 206(e) of the Federal Credit Union Act, 12 U.S.C. §1786(e), provides:

Opinion of Board as to unsound condition of credit union; notice of charges; hearing; order to cease and desist; judicial review; affirmative action; limitation of activities

(1) If, in the opinion of the Board, any insured credit union, credit union which has insured accounts, or any institution-affiliated party is engaging or has engaged, or the Board has reasonable cause to believe that the credit union or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such credit union, or is violating or has violated, or the Board has reasonable cause to believe that the credit union or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by the Board in connection with the granting of any application or other request by the credit union or any written agreement entered into with the

Board, the Board may issue and serve upon the credit union or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the credit union or the institution-affiliated party. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the Board at the request of any party so served. Unless the party or parties so served shall appear at the hearing by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the Board shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the Board may issue and serve upon the credit union or the institution-affiliated party an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the credit union or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the credit union or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the Board

or a reviewing court.

(3) Affirmative action to correct conditions resulting from violations or practices. The authority to issue an order under this subsection and subsection (f) of this section which requires an insured credit union or any institution-affiliated party to take affirmative action to correct any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such insured credit union or such party to-

(A) make restitution or provide reimbursement indemnification, or guarantee against loss if-

(i) such credit union or such party was unjustly enriched in connection with such violation or practice; or

(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the Board;

(B) restrict the growth of the institution;

(C) rescind agreements or contracts;

(D) dispose of any loan or asset involved; and

(E) employ qualified officers or employees (who may be subject to approval by the Board at the direction of such Board); and

(F) take such other action as the Board determines to be appropriate.

(4) Authority to limit activities. The authority to issue an order under this subsection or subsection (f) of this section includes the authority to place limitations on the activities or functions of an insured credit union or any institution-affiliated party.

Section 206(f) of the Federal Credit Union Act, 12 U.S.C. §1786(f), provides:

> **Temporary cease and desist order; injunctive procedure**
>
> **(1)** Whenever the Board shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the credit union or any institution-affiliated party pursuant to paragraph (1) of subsection (e) of this section, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the credit union, or is likely to weaken the condition of the credit union or otherwise prejudice the interests of its insured members prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (e) of this section, the Board may issue a temporary order requiring the credit union or such party to cease and desist from any violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order may include any requirement authorized under subsection (e)(3)(B) of this section. Such order shall become effective upon service upon the credit union or such institution-affiliated party and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the Administration shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the credit union or such party, until the effective date of such order.
>
> **(2)** Within ten days after the credit union concerned or

any institution-affiliated party has been served with a temporary cease-and-desist order, the credit union or such party may apply to the United States district court for the judicial district in which the home office of the credit union is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the credit union or such party under paragraph (1) of subsection (e) of this section, and such court shall have jurisdiction to issue such injunction.

(3) Incomplete or inaccurate records

(A) Temporary order

If a notice of charges served under subsection (e)(1) of this section specifies, on the basis of particular facts and circumstances, that an insured credit union's books and records are so incomplete or inaccurate that the Board is unable, through the normal supervisory process, to determine the financial condition of that insured credit union or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of that insured credit union, the Board may issue a temporary order requiring-

(i) the cessation of any activity or practice which gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or

(ii) affirmative action to restore such books or records to a complete and accurate state, until the completion of the proceedings under subsection (e)(1) of this section.

(B) Effective period

Any temporary order issued under subparagraph (A)-

(i) shall become effective upon service; and

(ii) unless set aside, limited, or suspended by a court in proceedings under paragraph (2), shall remain in effect and enforceable until the earlier of-

(I) the completion of the proceeding initiated under subsection (e) (1) of this section in connection with the notice of charges; or

(II) the date the Board determines, by examination or otherwise, that the insured credit union's books and records are accurate and reflect the financial condition of the credit union.

(4) In the case of violation or threatened violation of, or failure to obey, a temporary cease-and-desist order, the Board may apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the principal office of the credit union is located for an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened violation or failure to obey, it shall be the duty of the court to issue such injunction.

Section 206(h) of the Federal Credit Union Act, 12 U.S.C. §1786(h), provides:

> **Board's self-appointment as conservator; consultation with State; authority**
>
> **(1)** The Board may, *ex parte* without notice, appoint itself as conservator and immediately take possession and control of the business and assets of any insured credit union in any case in which-
>
> > **(A)** the Board determines that such action is necessary to conserve the assets of any insured credit union or to protect the Fund or the interests of the members of such insured credit union;
> > **(B)** an insured credit union, by a resolution of its board of directors, consents to such an action by the Board;
> > **(C)** the Attorney General notifies the Board in writing that an insured credit union has been found guilty of a criminal offense under section 1956 or 1957 of Title 18 or section 5322 or 5324 of Title 31;
> > **(D)** there is a willful violation of a cease-and-desist order which has become final; or
> > **(E)** there is concealment of books, papers, records, or assets of the credit union or refusal to submit books, papers, records, or affairs of the credit union for inspection to any examiner or to any lawful agent of the Board.
>
> **(2)** **(A)** In the case of a State-chartered insured credit union, the authority conferred by paragraph (1) shall not be exercised without the written approval

of the State official having jurisdiction over the State-chartered credit union that the grounds specified for such exercise exist.

(B) If such approval has not been received by the Board within 30 days of receipt of notice by the State that the Board has determined such grounds exist, and the Board has responded in writing to the State's written reasons, if any, for withholding approval, then the Board may proceed without State approval only by a unanimous vote of the Board.

(3) Not later than ten days after the date on which the Board takes possession and control of the business and assets of an insured credit union pursuant to paragraph (1), such insured credit union may apply to the United States district court for the judicial district in which the principal office of such insured credit union is located or the United States District Court for the District of Columbia, for an order requiring the Board to show cause why it should not be enjoined from continuing such possession and control. Except as provided in this paragraph, no court may take any action, except at the request of the Board by regulation or order, to restrain or affect the exercise of powers or functions of the Board as conservator.

(4) Except as provided in paragraph (3), in the case of a Federal credit union, the Board may maintain possession and control of the business and assets of such credit union and may operate such credit union until such time-

(A) as the Board shall permit such credit union to continue business subject to such terms and conditions as may be imposed by the Board; or

(B) as such credit union is liquidated in

accordance with the provisions of section 1787 of this title.

(5) Except as provided in paragraph (3), in the case of an insured State-chartered credit union, the Board may maintain possession and control of the business and assets of such credit union and may operate such credit union until such time-

(A) as the Board shall permit such credit union to continue business, subject to such terms and conditions as may be imposed by the Board;
(B) as the Board shall permit the transfer of possession and control of such credit union to any commission, board, or authority which has supervisory authority over such credit union and which is authorized by State law to operate such credit union; or
(C) as such credit union is liquidated in accordance with the provisions of section 1787 of this title.

(6) The Board may appoint such agents as it considers necessary in order to assist the Board in carrying out its duties as a conservator under this subsection.

(7) All expenses incurred by the Board in exercising its authority under this subsection with respect to any credit union shall be paid out of the assets of such credit union.

(8) The conservator shall have all the powers of the members, the directors, the officers, and the committees of the credit union and shall be authorized to operate the credit union in its own name or to conserve its assets in the manner and to the extent authorized by the Board.

(9) The authority granted by this subsection is in addition to all other authority granted to the Board under this chapter.

STATEMENT OF THE CASE

This action was instituted as an injunctive proceeding pursuant to FCUA §206(h)(3), 12 U.S.C. §1786(h)(3), and under 28 U.S.C. §1331.

Petitioner, CEDC Federal Credit Union (the "Credit Union"), is a twenty-three year old, low-income credit union. The Credit Union's charter, approved by the National Credit Union Administration ("NCUA") in 1973, declared its mission: to serve predominately low-income members and bring self-sufficiency to the anti-poverty program in Nassau County.

At its inception, the Credit Union applied for and was granted low-income status by the NCUA as its field of membership was comprised predominantly of low-income persons. In recognition of the economic realities, low-income credit unions may accept non-member deposits and participate in the Community Development Revolving Loan Program and receive other accommodations under the NCUA regulations. *See* 12 C.F.R. §701.32(d); *see also* 61 Fed. Reg. 3788. The Credit Union has made banking, loans and financial services available to low-income and minority persons often rejected by larger and more prestigious financial institutions because they were viewed as high risk.

Under the stewardship of its community-based board of directors, the Credit Union was financially growing and improving; it had experienced no loss. Using 1994 NCUA data, an independent entity, IDC Financial Publishing, Inc., ranked the Credit Union as "superior" when compared to the nation's other

credit unions.

As a federally-chartered and -insured credit union, the Credit Union has been subject to NCUA oversight. Virtually each year the NCUA conducted financial and management examinations resulting in written reports. Each examination was followed by various exit interviews where those reports were delivered to and discussed with Credit Union officials.

The most recent NCUA examination of the Credit Union began in June 1995 and was not concluded until late August 1995. No examination report was delivered, and no exit interviews were conducted.

Then, on September 5, 1995, without any notice or warning, the NCUA appeared at the Credit Union and announced it had appointed itself conservator. The Credit Union's business and assets were seized by the NCUA on that day and have been held by the conservator since, without any indication when, or even if, the Credit Union might be returned to the possession and control of its low-income shareholders and their duly elected board of directors.

The reasons espoused by the NCUA to support the conservatorship are set forth in the Confidential Statement of Grounds which is included in the administrative record. As set forth in the Confidential Statement, the NCUA imposed the conservatorship because, among other things: (i) loans from the Credit Union to the sponsor, CEDC, Incorporated, allegedly violate the FCUA's stated lending limits; (ii) loans to the Credit Union's sponsor organizations allegedly are not properly documented and some non-member deposits have supposedly been mishandled, and (iii) various recordkeeping problems exist, the latter two items constituting "unsafe and unsound condition[s] that present[s] undue risk to the National Credit

Union Share Insurance Fund."[1]

On September 15, 1995 the Credit Union presented its order to show cause, pursuant to section 206(h)(3) of the Federal Credit Union Act, 12 U.S.C. §1786(h)(3), to the United States District Court for the Eastern District of New York seeking an order enjoining the NCUA Board from continuing its conservatorship of the Credit Union. The court (Hurley, J.), in the presence of counsel for both parties, denied the Credit Union's application for a temporary restraining order. The Credit Union requested the district court to conduct an evidentiary hearing; the court initially agreed that a hearing would be held. Later, the court stated it would consider whether a hearing was appropriate. On or about December 11, 1995 all papers were submitted to the district court, without hearing or evidence or oral argument.

By memorandum and order dated January 24, 1996 (entered on January 30, 1996), the district court, without hearing oral argument or conducting an evidentiary hearing, denied the Credit Union's application in its entirety. In its order, the court summarily rejected all of the Credit Union's arguments and held: (i) the conservatorship section of the FCUA is not unconstitutional on its face or as applied; (ii) no pre- or post-deprivation evidentiary hearing was required; (iii) the NCUA's decision to appoint itself as conservator was not arbitrary and capricious based solely on the district court's review of the administrative record prepared exclusively by the NCUA; and, accordingly, (iv) the conservatorship should not be enjoined.

The Credit Union timely filed a notice of appeal to the

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[1] At a minimum the issues regarding the loans and the record-keeping problems had been subjects of prior examination reports, and had received joint attention by the Credit Union and the NCUA. There was no run on the Credit Union or other emergency cited in the Confidential Statement as necessitating the immediate conservatorship.

Court of Appeals for the Second Circuit on February 28, 1996. Oral argument was held on September 16, 1996. By summary order entered on September 26, 1996, the Second Circuit affirmed the district court's order.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S DECISION IMPERMISSIBLY LEAVES IN THE HANDS OF ADMINISTRATIVE OFFICIALS THE UNREVIEWABLE CHOICE TO AFFORD DUE PROCESS PROTECTIONS

Almost twelve hundred credit unions, with over $300 billion in assets, are insured by the NCUA and are thus subject to its enforcement procedures. Congress has furnished the NCUA with several enforcement mechanisms; but Section 206 of the FCUA, 12 U.S.C. § 1786, does not provide sufficient guidelines for the exercise of administrative agency discretion. That statute is unconstitutional because it permits agency officials, at their caprice, to decide whether to invoke a procedure which affords a credit union due process protections (prior, fact-specific notice of charges, evidentiary hearing, burden of proof on the NCUA, credit union rebuttal and cross-examination, "substantial evidence" judicial review, *etc.*), or to invoke an *ex parte* conservatorship, with no right to be heard and only the most limited judicial review. And both choices are available to the agency *for the identical conduct by the credit union.*

Judicial deference to the special expertise of administrative agencies cannot, by perhaps careless legislation, be transformed into administrative determination of constitutional rights. This Court's lessons on Due Process, from *Green v. McElroy,* 360 U.S. 474 (1959) to *Goldberg v. Kelly,* 397 U.S. 254 (1970) to *Fuentes v. Shevin,* 407 U.S. 67 (1972) to *Mathews v. Eldridge,* 424 U.S. 319 (1976), are far too important to be left to the unreviewable discretion of *any* administrative body.

Subsection (b) of § 206 of the FCUA, 12 U.S.C. § 1786(b), authorizes the NCUA to serve a notice to correct if an insured credit union is in "an unsafe or unsound condition"; if the condition is not corrected, a notice of violation may be served, setting the matter down for a hearing.[2] The NCUA board may order, after a hearing (or on consent), the termination of the insured status of the credit union.

Under subsection (e), 12 U.S.C. § 1786(e), where there is a violation of law or an "unsafe or unsound" condition, the NCUA board may, after notice of charges and a hearing,[3] issue a cease-and-desist order or an order compelling affirmative action to correct such condition. Subsection (f) provides that in a defined emergency, or where a credit union's ". . . books and records are so incomplete or inaccurate that the [NCUA] Board is unable . . . to determine the financial condition . . . ", 12 U.S.C. § 1786(f)(3)(A), the NCUA may issue a temporary order in advance of a hearing to be conducted under subsection (e), 12 U.S.C. §1786(e).

Finally as relevant here, §206(h) of the FCUA, 12 U.S.C. §1786(h), provides that the NCUA may appoint itself conservator of a credit union, *ex parte* and without notice or hearing if:

> (A) the Board determines that such action is necessary to conserve the assets of any insured credit union or to protect the [National Credit Union Share Insurance] Fund or the interests of

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[2] Pursuant to §206(j) of the FCUA, 12 U.S.C. § 1786(j) (App., *infra*, 14a - 15a), any such hearing shall be conducted in accordance with the provisions of Chapter 5 of the Administrative Procedure Act, 5 U.S.C. §§501 *et seq*.

[3] *See* note [1], *supra*.

the members of such insured credit union;

* * *

> (D) there is a willful violation of a cease-and-desist order which has become final; or
> (E) there is concealment of books, papers, records, or assets . . . or refusal to submit books, papers, records, or affairs . . . for inspection . . . .

12 U.S.C. §1786(h)(1).

By rejecting the Credit Union's constitutional arguments and refusing to enjoin the conservatorship the courts below have ruled, in essence, that a credit union will have Due Process only when the NCUA decides to permit it. The NCUA itself twice used the talismanic "unsafe and unsound" in its Confidential Statement of Grounds, the very term used by Congress in granting the NCUA the power to terminate insurance status or issue cease-and-desist/corrective action orders. The term "unsafe and unsound" does not even appear among the statutory grounds for conservatorship. *See* § 206(h)(1)(A-E), 12 U.S.C. §1786(h). Yet the courts below, in apparent deference to administrative expertise, permitted the NCUA to impose a conservatorship and would not even permit inquiry why the agency had chosen among the remedies as it did. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 165-168 (1962) (when administrative agency chooses among various remedies, its determination must set out the basis for its choice).

The Circuit Court's construction of §206 of the FCUA leaves the NCUA with virtually unchecked power; beyond that, it is submitted, which Congress ever intended, or our Constitution can tolerate. The NCUA can choose not merely which coercive remedy to apply in the face of certain conduct (*see, e.g., Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608 (1946); *see also Burlington Truck Lines, supra*), it can choose whether a credit union will have any meaningful ability to

defend itself, to present facts and arguments in its favor, and to make a record for judicial review.

The potential for further abuse is real. Once the NCUA is permitted to wrest a credit union from the control of its lawful, community-selected board of directors via conservatorship, there is little need for it to ever invoke the procedures Congress provided for lesser remedies, such as the cease-and-desist order. If a credit union does not agree with the NCUA, rather than being furnished the opportunity to contest proposed action in good faith, via a fair administrative hearing process, it can become the next target of an *ex parte* conservatorship, where its side of the dispute is never heard, and therefore cannot be reviewed by any court. And, in matters of this sort there is substantial risk of erroneous determination by the NCUA. A determination of what is "unsafe and unsound" enough to warrant a conservatorship rather than a cease-and-desist order is hardly an objective matter. *Cf. Federal Deposit Insurance Corporation v. Mallen*, 486 U.S. 230 (1988).

The damage of an erroneous deprivation is great. There is the damage to the reputations of ousted credit union board members, the job losses of credit union officials and employees, the loss of confidence of credit union members (*i.e.*, depositors). The credit union cooperative model, particularly for the members of the nation's low income credit unions such as petitioner, is an experience in empowerment, financially and organizationally. Thus, the sphere of interests in each individual credit union is great, as is the importance of this case.

And the issues raised here are not just important to the credit union community – they reach the entire financial community. As the case law demonstrates, those issues have arisen under other banking legislation, which also provides for the *ex parte* appointment of a conservator or receiver. *See, e.g., Fidelity Savings and Loan Association v. Federal Home Loan*

Bank Board, 540 F. Supp. 1374 (N.D.Ca. 1982), *revd. on other grounds*, 689 F.2d 803 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (Home Owners' Loan Act of 1933, 12 U.S.C. §§1461 *et seq.*); *First National Bank & Trust v. Department of Treasury*, 63 F.2d 894 (9th Cir. 1995), *cert. denied*, __U.S. __, 116 S. Ct. 1875 (1996) (Bank Conservation Act, 12 U.S.C. §§201 *et seq.*).

II. THE ISSUES RAISED IN THIS CASE SHOULD BE DECIDED BY THE COURT TO AVOID FURTHER CONFLICT AMONG THE LOWER COURTS

This case is not the first Circuit Court case to address the constitutional adequacy of the FCUA's *ex parte* conservatorship procedures.[4] *See Bingham v. National Credit Union Administration Board*, 927 F.2d 282 (6th Cir. 1991), *cert. denied*, 502 U.S. 817 (1991). In *Bingham*, the district court had conducted a two-day evidentiary hearing to determine whether facts existed which supported the NCUA's decision to appoint itself conservator. The Court of Appeals affirmed, noting that the district court's findings were unchallenged. *Bingham v. National Credit Union Administration Board, supra*, 927 F.2d at 286. The *Bingham* court's conclusions regarding several due process issues are in accord with the Second Circuit's ruling here: both courts agree that no *pre*-conservatorship hearing is required; and both adopt the "arbitrary and capricious" standard of review. But as to one significant issue at least – the *scope* of review – the decisions of the two circuits are in conflict. The Second Circuit's opinion in this case limits judicial review to the administrative

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[4] In *Oiciyapi Federal Credit Union v. National Credit Union Administration*, 936 F.2d 1007 (8th Cir. 1991) the petitioner challenged, on constitutional grounds, certain aspects of the involuntary liquidation at issue. As the court noted, the affected credit union had received prior notice, from the NCUA, of the intended liquidation, and a full Administrative Procedure Act hearing before an administrative law judge. *Id.*, at 1009.

record, while in the Sixth Circuit the reviewing court will conduct evidentiary hearings.

Besides this conflict among circuits, there is a strong tension, if not a direct conflict, between the Second Circuit's ruling here and decisions by other federal courts examining the *ex parte* conservatorship/receivership provisions in analogous banking statutes. *See, e.g., Telegraph Savings and Loan Association v. Schilling,* 703 F.2d 1019 (7th Cir. 1983), *cert. denied,* 464 U.S. 992 (1983) (receivership under Home Owners' Loan Act of 1933; scope of review included evidentiary hearing in District Court); *Collie v. Federal Home Loan Bank Board,* 642 F.Supp. 1147 (N.D. Ill. 1986) (receivership under Home Owners' Loan Act; scope of review not limited to administrative record; standard of review: court determines whether facts constituting the statutory grounds for appointment existed); *Fidelity Savings and Loan Association v. Federal Home Loan Bank Board, supra* (same).

Because of the importance of the Due Process issues raised, and because this is an area of disagreement and disharmony among several circuit and district courts, the Court, it is submitted, should grant the writ and resolve the constitutional issues.

CONCLUSION

For the reasons stated in this Petition, the CEDC Federal Credit Union requests this Court to grant the writ of certiorari to review the summary order of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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December 20, 1996

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of September, one thousand nine hundred and ninety-six.

Present: HONORABLE THOMAS J. MESKILL,
HONORABLE RALPH K. WINTER,
HONORABLE FRANK X. ALTIMARI,

Circuit Judges.

IN RE: THE CONSERVATORSHIP OF CEDC FEDERAL CREDIT UNION

CEDC FEDERAL CREDIT UNION,
Petitioner-Appellant,

- v. - No. 96-6064

NATIONAL CREDIT UNION ADMINISTRATION,
Respondent-Appellee.

Appearing for Appellant: Douglas J. Good, Ruskin, Moscou, Evans & Faltischek, Mineola, New York.

Appearing for Appellee: Kevin P. Mulry, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York.

Appeal from the United States District Court for the Eastern District of New York (Hurley, Judge).

This cause came to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby affirmed.

CEDC Federal Credit Union (the "Credit Union") appeals from a decision by Judge Hurley denying the Credit Union's application to enjoin the conservatorship that the National Credit Union Administration ("NCUA") imposed on it pursuant to § 206(h)(3) of the Federal Credit Union Act, 12 U.S.C. § 1786(h)(3).

The Credit Union argues that: (i) the conservatorship statute is an unconstitutional delegation of authority; (ii) the conservatorship statute violates the Fifth and Fourth Amendments; and (iii) the NCUA's action was arbitrary and capricious. The Credit Union's contentions are entirely without merit, and we affirm.

The Credit Union argues that the conservatorship statute is an unconstitutional delegation of authority because, without providing sufficient guidelines, it gives the NCUA the ability to invoke any of three available remedies for arguably the same problems. The NCUA can: (i) issue a notice to correct unsafe or unsound practices, 12 U.S.C. § 1786(b)(l); (ii) obtain an order to cease and desist from unsafe or unsound practices, § 1786 (e) (1); or (iii) appoint itself as a conservator when it "is necessary to conserve the assets of any insured credit union or protect the Fund or the interests of the members," § 1786(h)(1). While the first two remedies require notice, the third remedy allows the NCUA to "ex-parte without notice, appoint itself as conservator and immediately take possession and control of the business and assets." § 1786(h)(l). The Credit Union claims that a due process violation exists where the NCUA has unfettered authority to choose between two remedies requiring notice and a remedy requiring no notice -- the conservatorship. We disagree.

As long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to

[act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). Accordingly, Section 1786(h)(1) lists multiple situations where conservatorship is appropriate: when it is necessary to preserve the assets of any insured credit union; when an insured credit union agrees to a conservator; when the Attorney General notifies the NCUA that the credit union has been found guilty of certain criminal offenses; when there is a willful violation of a cease and desist order; and when there is concealment of books, papers, records or assets. § 1786(h)(l)(A)-(E). Moreover, that Congress left the NCUA with the discretion to choose between appointing a conservator or employing other remedies does not make the act unconstitutional. Choosing remedies is well within the role of an administrative body. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984).

Likewise, the Credit Union's claim that the statute's lack of a notice or hearing requirement for the imposition of a conservatorship violates its Fifth Amendment due process rights is also without merit. The Supreme Court has held that no predeprivation notice or hearing is necessary "in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993) (citation and internal quotation marks omitted). The government's interests in protecting bank depositors and the public from unsound practices justifies the appointment of a conservator without prior notice. See Fahey V. Mallonee, 332 U.S. 245, 253-54 (1947) (conservatorship of savings and loan). The government also has an interest in protecting the federal treasury from unnecessary insurance claims by depositors resulting from bank failures. The same rationale applies to the government's protection of credit unions.

The conservatorship statute safeguards the Credit

Union's due process interests by providing post deprivation review of the administrative decision by the district court. 12 U.S.C. § 1786(h)(3); see also First Nat'l Bank & Trust v. Dep't of the Treasury, 63 F.3d 894, 899 (9th Cir. 1995), cert. denied, 116 S. Ct. 1875 (1996); Woods v. Federal Home Loan Bank Bd., 826 F.2d 1400, 1411 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988).

The Credit Union's argument that the conservatorship violates the Fourth Amendment because it is a warrantless seizure is also meritless. In order to operate as a federally insured credit union, the Credit Union agreed to NCUA supervision -- it gave the NCUA permission to examine its book and records. Now, when the NCUA has determined that the Credit Union's business practices have created the need for the guidance of a conservator, the Credit Union cannot claim that such supervision is a warrantless seizure. Cf. Franklin Sav. Ass'n v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1141 (10th Cir. 1991) ("The decision to appoint a conservator is not a judgment to divest the owner of his property. Rather, it is a judgment that the owner is unable or unwilling to properly manage or control the assets and it is an attempt to put the institution back into a safe and sound condition."), cert. denied, 503 U.S. 937 (1992).

Nor do we find that the district court erred in affirming the NCUA's decision to appoint a conservator. The Administrative Procedure Act, 5 U.S.C. § 706(2)(a), provides the appropriate standard of review for the court: the NCUA's decision should be set aside only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Usually, judicial review is restricted to the administrative record. See Franklin Sav. Ass'n, 934 F.2d at 1140; Woods, 826 F.2d at 1409; Gibraltar Sav. v. Ryan, 772 F. Supp. 1290, 1293 (D.D.C. 1991). Ample evidence supports the district court's finding that the NCUA's decision was proper. The Credit Union grossly exceeded NCUA regulations by concentrating its loans to specific members; excessive loans

were made to the Credit Union's sponsors without proper application, authorization, or indication of ability to repay; security listed for sponsor loans, often just an account number, was crossed-out and substituted and lacked indication as to what part of the security was pledged; recordkeeping problems continued for several years; and the Credit Union had shown a reluctance to provide NCUA officials with information.

The Credit Union urges us to find that the district court should have expanded the scope of review beyond the administrative record, because the NCUA allegedly acted in bad faith. While courts have recognized limited circumstances in which a reviewing court may go beyond the administrative record, see, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (where administrative record fails to disclose factors considered by the agency), we do not find the bad faith allegations even remotely persuasive.

Accordingly we affirm.

Hon. Thomas J. Meskill, U.S.C.J

Hon. Ralph K. Winter, U.S.C.J.

Hon. Frank X. Altimari, U.S.C.J.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X **TO BE FILED UNDERSEAL**

IN RE THE CONSERVATORSHIP OF

MEMORANDUM AND ORDER

CEDC FEDERAL CREDIT UNION 95-CV-3757 (DRH)

----------X

APPEARANCES:

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HURLEY, District Judge

On August 30, 1995, Respondent National Credit Union Administration ("NCUA") issued ex parte without notice, pursuant to 12 U.S.C. § 1786(h)(1)(A), an Order appointing itself conservator of CEDC Federal Credit Union ("CEDC"). (See Admin. R. Ex. 4.) On September 5, 1995, CEDC received notice of such Order, (see CEDC's Nov. 30, 1995 Mem. at 9, 18; NCUA's Sept. 26, 1995 Mem. at 5), which directed CEDC's "Board of Directors and management . . . to cease all activity on behalf of CEDC . . . [and] to turn over and release to the duly appointed Agent for the Conservator" all materials such as books, records, accounts, assets, and property belonging to CEDC. (See Admin. R. Ex. 4 at 12.)

On September 15, 1995, CEDC applied to this Court, pursuant to 12 U.S.C. § 1786(h)(3), for a Temporary Restraining Order ("TRO") enjoining NCUA from continuing its conservatorship of CEDC; the Court denied the requested TRO, and directed that the parties submit position papers on CEDC's Motion to enjoin such conservatorship. For the reasons indicated below, the Court denies CEDC's Motion to enjoin its conservatorship by NCUA.

DISCUSSION

CEDC advances a two-pronged attack upon its conservatorship by NCUA. First, CEDC argues that 12 U.S.C. § 1786 ("Section 1786") is unconstitutional on its face and as applied. (See CEDC's Nov. 30, 1995 Mem. at 10-26.) Alternatively, CEDC argues that even if Section 1786 is constitutional, NCUA's decision to appoint a conservator for CEDC pursuant to such section was arbitrary and capricious and, thus, such conservatorship should be enjoined. (See id. at 26-36.) The Court addresses these arguments seriatim.

I. Constitutionality of Section 1786

CEDC challenges the constitutionality of Section 1786,

on its face and as applied, on the following grounds:

> (1) "the statutory provisions regarding the NCUA's supervision and disciplining of Credit Unions (including the Conservatorship Section) are devoid of any meaningful guidelines, standards or safeguards," and, thus, represent an improper delegation by Congress of its authority;

(See CEDC's Nov. 30, 1995 Mem. at 10-14.)

> (2) the statutory provision that permits the ex parte appointment of a conservator, without notice and without a pre-deprivation hearing, and allows such conservator to immediately take possession and control of the business and assets of CEDC, violates the Due Process Clause of the Fifth Amendment as well as the Fourth Amendment's prohibition on unreasonable searches and seizures;

(See id. at 14-26.) As explained below, the Court rejects CEDC's challenges to the constitutionality of Section 1786.

A. Congressional Delegation of Authority

To summarize, CEDC maintains that because Section 1786 provides NCUA with alternative approaches to similar situations -- some of which provide for hearings, others which do not -- it represents an improper delegation of Congressional power to NCUA. (See CEDC's Nov. 30, 1995 Mem. at 13-14.) The Court has considered the arguments advanced in support of, and in opposition to, this contention by CEDC. After consideration of the same, and review of relevant case law regarding Congressional delegation of authority to an administrative agency, the Court finds that Section 1786 does not represent an improper delegation of authority by Congress

to NCUA.

B. Due Process

Next, the Court turns its attention to CEDC's argument that Section 1786(h)(1) violates the Due Process Clause of the Fifth Amendment because it permits the ex parte appointment of a conservator without notice and without any pre-deprivation hearing. (See CEDC's Nov. 30, 1995 Mem. at 14-20.) NCUA responds that neither pre-appointment notice nor a pre-deprivation hearing is constitutionally required. (NCUA's Dec. 11, 1995 Reply Mem. at 10.)

After reviewing relevant case law, the Court agrees with NCUA that its ex parte appointment as conservator of CEDC without notice and without any pre-deprivation hearing did not violate the Due Process Clause. See, e.g., First Nat'l Bank & Trust v. Department of Treasury, 63 F.3d 894, 896-97 (9th Cir. 1995) (rejecting Due Process challenge to appointment of conservator for insured depository institution pursuant to 12 U.S.C. § 203, recodified at 12 U.S.C. § 1821) ("It is well-recognized that the government's interest in protecting bank depositors and the public weal justifies the appointment of a conservator without a prior hearing.") (citing Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947)) (further citation omitted); Gibraltar Sav. v. Ryan, 772 F. Supp. 1290, 1295 (D.D.C. 1991) (rejecting Due Process challenge to appointment of conservator for federally-insured savings association pursuant to 12 U.S.C. § 1464) ("Due process . . . does not require a hearing before the appointment of a receiver, and after appointment, judicial review . . . satisfies due process."); see also Woods v. Federal Home Loan Bank Bd., 826 F.2d 1400, 1410 (5th Cir. 1987) (rejecting Due Process challenge to appointment of conservator for savings and loan association pursuant to 12 U.S.C. § 1464) ("In many instances a preseizure hearing and notice of planned action could thwart the Bank Board's need to act decisively to secure remaining assets."), cert. denied, 485 U.S. 959 (1988).

CEDC further suggests that Due Process requires a post-deprivation evidentiary hearing. (See CEDC's Nov. 30, 1995 Mem. at 20-24.) After reviewing relevant case law, the Court finds that Due Process does not require such an evidentiary hearing. Rather, the Court's review of the administrative record, under the arbitrary and capricious standard, satisfies Due Process.[1] See, e.g., Woods, 826 F.2d at 1411-12.

Finally, the Court notes CEDC's contention that NCUA's failure to serve upon it a statement pursuant to 12 U.S.C. § 1786(b)(1) ("Section 1786(b)(1)") "warrants the termination of the conservatorship." (CEDC's Nov. 30, 1995 Mem. at 22-23 n.5.) NCUA responds that Section 1786(b)(1) "applies only when the NCUA intends to terminate a credit union's insurance."[2] (NCUA Dec. 11, 1995 Reply Mem. at 9.) Because NCUA appointed itself as conservator of CEDC pursuant to Section 1786(h)(1)(A), which expressly provides for such appointment "ex parte without notice," 12 U.S.C. § 1786(h)(1)(A), the Court rejects CEDC's argument that any failure by NCUA to serve a statement pursuant to Section 1786(b)(1) warrants the termination of the conservatorship at issue.

C. Fourth Amendment

Next, CEDC argues that Section 1786(h)(1) violates the Fourth Amendment "because it permits an unconstitutional seizure." (See CEDC's Nov. 30, 1995 Mem. at 25.) Such an

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[1] The Court rejects CEDC's argument that its allegations of bad faith on the part of NCUA entitle it to an evidentiary hearing. (See CEDC's Nov. 30, 1995 Mem. at 26-31.)

[2] NCUA further argues that "[t]he construction of [S]ection 1786 proposed by . . . [CEDC] would require the NCUA to first seek to terminate a credit union's deposit insurance rather than utilizing the less restrictive alternatives of a cease and desist order or a conservatorship." (NCUA's Dec. 11, 1996 Reply Mem. at 9.)

assertion does not merit much discussion. Suffice to say, the Court finds that NCUA's appointment as conservator did not effect an unconstitutional seizure of CEDC's business and assets.

D. Conclusion on CEDC's Constitutional Challenges

In light of the foregoing, the Court rejects CEDC's arguments that Section 1786 is unconstitutional on its face or as applied.[3] The Court, therefore, need not, and does not, consider NCUA's contention that CEDC is estopped from challenging the constitutionality of such section. (See NCUA Dec. 11, 1995 Reply Mem. at 14-15.)

II. Review of Administrative Record

As indicated above, see supra at 5, the Court finds that NCUA's decision to appoint itself as conservator of CEDC is to be evaluated on the basis of the administrative record, and that the standard for such review is whether or not NCUA's decision was "arbitrary and capricious." See, e.g., Woods, 826 F.2d at 1406-09; see also 5 U.S.C. § 706 (Administrative Procedure Act).

The August 30, 1995 Order of Conservatorship at issue indicated as "Grounds for Conservatorship" that

> [p]ursuant to 12 U.S.C. Section 1786(h)(1)(A), the NCUA Board has determined that the imposition of a conservatorship is necessary to conserve the assets of CEDC Federal Credit Union and to protect the National Credit Union Share Insurance Fund . . . and the interests of the members of CEDC Federal Credit Union....

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[3] To the extent that any of the constitutional arguments advanced by CEDC are not specifically discussed herein, they have been considered and rejected by this Court.

(See Admin. R. Ex. 4 at 14.) Also included as part of the Administrative Record is a "Confidential Statement of Grounds for Conservatorship." (See id. Ex. 5.)

After reviewing the NCUA Administrative Record, this Court finds that NCUA's decision to appoint itself conservator of CEDC pursuant to Section 1786(h)(1)(A) was neither arbitrary nor capricious.

Conclusion

For the reasons indicated above, the Court denies CEDC's Motion to enjoin NCUA's conservatorship.

SO ORDERED.

Dated: Hauppauge, New York
January 24, 1996

Denis R. Hurley, U.S.D.J.

APPENDIX C

Section 206(j) of the Federal Credit Union Act, 12 U.S.C. §1786(j), provides:

Jurisdiction of hearing; procedure; judicial review

(1) Any hearing provided for in this section (other than the hearing provided for in subsection (i)(3) of this section) shall be held in the Federal judicial district or in the territory in which the principal office of the credit union is located, unless the party afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of Title 5. After such hearing, and within ninety days after the Board has notified the parties that the case has been submitted to it for final decision, it shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in this subsection (j). Unless a petition for review is timely filed in a court of appeals of the United States, as provided in paragraph (2) of this subsection, and thereafter until the record in the proceeding has been filed as so provided, the Board may at any time, upon such notice and in such manner as it may deem proper, modify, terminate, or set aside any such order. Upon such filing of the record, the Board may modify, terminate, or set aside any such order with permission of the court.

(2) Any party to any proceeding under paragraph (1) may obtain a review of any order served pursuant to paragraph (1) of this subsection (other than an order issued with the consent of the credit union or the institution-affiliated party concerned or an order issued under subsection (i)(1) of this section) by filing in the court of appeals of the United States

for the circuit in which the principal office of the credit union is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the Board be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the Board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall, except as provided in the last sentence of said paragraph (1), be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the Board. Review of such proceedings shall be had as provided in chapter 7 of Title 5. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(3) The commencement of proceedings for judicial review under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of any order issued by the Board.